

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JAMES L. BROWN, SR.,

Petitioner,

v.

UNITED STATES,

Respondent.

NO. C06-1095MJP

ORDER ADOPTING REPORT &
RECOMMENDATION AND
DISMISSING HABEAS PETITION

This matter comes before the Court on Petitioner's Objections (Dkt. No. 22) to Magistrate Judge Benton's Report & Recommendation (Dkt. No. 17) denying his request for habeas relief under 28 U.S.C. § 2255. Having reviewed the Report and Recommendation ("R&R"), the Objections, and the record, the Court ADOPTS the R&R and DISMISSES Petitioner's request for habeas relief.

Background

James L. Brown, Sr. is a federal prisoner who was tried on criminal charges in federal court, with Judge William Dwyer presiding. Mr. Brown was convicted in July 1997 of various drug offenses and related counts, including conspiracy to distribute cocaine and cocaine base, attempted possession of cocaine with intent to distribute, and money laundering. In December 1997, Judge Dwyer ordered that Mr. Brown serve concurrent sentences of 324 months and 240 months in prison. In November 2000, acting pro se, Mr. Brown filed a 28 U.S.C. § 2255 petition challenging his conviction and

1 sentence. He was later appointed counsel, who filed a substitute § 2255 petition in May 2002 that was
2 considered by this Court. The Court vacated Mr. Brown's conviction for the continuing criminal
3 enterprise charge. In October 2005, the Court resentenced Mr. Brown to 185 months in prison and
4 five years supervised release.

5 In his latest § 2255 petition, filed on July 20, 2006, Mr. Brown challenges his current sentence,
6 claiming ineffective assistance of counsel at the resentencing hearing and deficient performance for
7 failure to investigate. He requests a resentencing. His claims rest primarily on a discrepancy between
8 the testimony of two witnesses, Denita Solitaire and Shana Muldrow, who testified before Judge
9 Dwyer. Both women testified as to the amount of cocaine attributable to Mr. Brown in a given week.
10 Ms. Solitaire testified to a higher amount, and Judge Dwyer specifically referenced her testimony
11 during sentencing when he explained his method of calculating the drug amount upon which he based
12 Defendant's sentence. Ms. Muldrow testified to a smaller amount, and Mr. Brown claims that she is
13 the more reliable witness. Mr. Brown claims that if Ms. Muldrow's testimony had been given greater
14 weight, Judge Dwyer would have reached a lower calculation of the drug amount, and would have
15 imposed a lower sentence. Because this Court relied on Judge Dwyer's calculations of the drug
16 amount, Mr. Brown contends that this Court's sentence was also based on erroneous testimony.

17 Magistrate Judge Benton considered Mr. Brown's petition (Dkt. No. 1) and the Government's
18 response (Dkt. No. 12), found Petitioner's claims to lack merit, and recommends that his habeas
19 petition be denied. Petitioner's objections to the R&R do not contain new arguments, but primarily
20 restate the previous claims which were considered by Magistrate Judge Benton.

21 Analysis

22 1. Ineffective Assistance of Counsel

23 Petitioner opens his objections by repeating his first claim to Judge Benton - ineffective
24 assistance. He argues that counsel failed to inform this Court during the resentencing hearing that Ms.
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1 Muldrow's testimony regarding the drug amount had never been considered by either Judge Dwyer or
2 by this Court. Mr. Brown notes that at the original sentencing hearing, Judge Dwyer explained how
3 he arrived at his calculation of the drug amount. He attributed portions of the final amount to Ms.
4 Solitaire, based on her testimony, but did not mention Ms. Muldrow. Petitioner claims that Judge
5 Dwyer's silence regarding Ms. Muldrow's testimony proves that he did not consider her statements.
6 Petitioner further argues that because this Court relied on Judge Dwyer's calculations, the purported
7 oversight of Ms. Muldrow's testimony by Judge Dwyer also led to error at the resentencing hearing.

8 Petitioner's second ineffectiveness argument is closely tied to the first. He asserts that his
9 counsel's performance was defective because counsel failed to request a sentencing adjustment under
10 §1B1.3 of the Federal Sentencing Guidelines. He asserts that this omission, along with the alleged
11 failure to highlight Ms. Muldrow's testimony to this Court, resulted in constitutionally ineffective
12 assistance of counsel that caused him to receive a longer sentence than he deserved.

13 a. The Strickland Standard

14 To succeed on an ineffective assistance of counsel claim, the petitioner has the burden to show
15 that: (1) counsel's performance was deficient, in that errors so serious were made that the "counsel"
16 guaranteed by the Sixth Amendment was not present, and (2) the deficient performance prejudiced the
17 result and prevented a fair trial. Strickland v. Washington, 466 U.S. 668, 687 (1984). This second
18 prong is achieved by showing "reasonable probability" that were it not for counsel's errors, the
19 outcome of the proceeding would have been different. Id.; see also United States v. Cochrane, 985
20 F.2d 1027, 1030 (9th Cir. 1993). Although the petitioner is required to show both prongs in order to
21 prove ineffective assistance, the court does not have to consider both prongs, if one is found to be
22 lacking, and there is no prescribed order in which to address these prongs. Strickland, 466 U.S. at
23 697.

1 The standard for determining attorney performance is “reasonably effective assistance.” Id. at
2 687. This includes a duty of loyalty, a duty to advocate the defendant’s cause, and a duty to make
3 reasonable investigations. Id. at 688. Professional standards provide that the attorney must consult
4 with a criminal defendant on important decisions and keep the defendant informed of important
5 developments. Id. Within this framework, the attorney does have discretion to make tactical
6 decisions. Id. at 689. Although an attorney must bring enough skill and knowledge to any proceeding
7 to ensure a reliable adversarial process, the court is required to review ineffectiveness claims under a
8 strong presumption that counsel’s conduct was reasonable. Id. at 689-90. In other words, judicial
9 scrutiny must be highly deferential and must consider the totality of evidence before the judge and
10 jury, without relying on hindsight. No special standards apply to habeas proceedings regarding
11 ineffective assistance of counsel. Id. at 698.

12 b. Counsel’s Treatment of the Conflicting Testimony Was Sufficient

13 Mr. Brown’s attorney, Brian Tsuchida, provided a reasonable level of assistance in relation to
14 the issue of the drug amount. As Magistrate Judge Benton concluded, Mr. Tsuchida did address Ms.
15 Muldrow’s testimony, just not in the specific manner that his client wanted. Mr. Brown acknowledges
16 that his counsel argued in memorandums and at resentencing that Ms. Muldrow’s testimony
17 contradicted Ms. Solitaire’s testimony, and that Ms. Muldrow was the more reliable witness. (Dkt.
18 No. 1, Ex. Part 1 at 13.) According to Petitioner, Mr. Tsuchida believed that demonstrating the
19 conflicts between Ms. Solitaire and Ms. Muldrow’s testimony would provide the court with sufficient
20 information from which to draw a reasonable conclusion. (Dkt. No.1, Ex. Part 1 at 11.) A
21 determination of how to present relevant information falls within the tactical discretion Strickland
22 affords attorneys. 466 U.S. at 689. Despite Petitioner’s concerns that this argument was not
23 adequately connected to the calculation of the drug amount, the Court concludes that counsel’s
24 actions met the deferential Strickland standard.

1 c. No Evidence Indicates Relevant Testimony Was Overlooked by Either Sentencing Judge

2 Judge Dwyer stated that his findings were based “on the evidence admitted at trial” and that
 3 the evidence was viewed “most favorably to the defendant.” (Dkt. No. 12, Attachment A at 19.) Both
 4 Ms. Muldrow and Ms. Solitaire testified at trial, and transcripts of their testimony were part of the
 5 record. Because Ms. Muldrow testified at trial and was cross-examined, and because the drug amount
 6 was a fact in dispute, it is proper to assume that Judge Dwyer considered her testimony before
 7 calculating the final drug amount. It is also proper to assume that this Court considered Ms.
 8 Muldrow’s testimony.

9 The Strickland standard requires the court to consider with deference the totality of evidence
 10 reviewed at trial. 466 U.S. at 689-90. Based on this standard, it is improper to focus exclusively on
 11 one or two statements made by Judge Dwyer or this Court. The record of the proceedings indicates
 12 that both judges considered all of the relevant evidence when calculating the drug amount.

13 d. Counsel Did Not Need to Specifically Request a Sentencing Adjustment

14 Petitioner faults his attorney for failing to explicitly request mitigation under section 1B1.3 of
 15 the Federal Sentencing Guidelines.¹ Mr. Brown relies on several unauthoritative cases in which courts
 16 held that counsel was deficient for failing to adequately present a request for mitigating conditions
 17 under section 3B1.2.² See United States v. Soto, 132 F.3d 56 (D.C. Cir. 1997) (holding that counsel
 18 must specifically request sentence reduction under § 3B1.2 rather than reciting list of mitigating
 19 factors); United States v. Headley, 923 F.2d 1079 (3rd Cir. 1991) (finding that counsel was ineffective
 20 for failing to argue for downward adjustment under § 3B1.2 based on mitigating factors); United

21 ¹ Section 1B1.3 requires a sentencing judge to determine the guideline range for the
 22 sentence based on “relevant conduct.” Factors to consider are enumerated, including
 23 willful acts and omissions, jointly undertaken criminal activity, and resulting harm.

24 ² Section 3B1.2 requires a sentencing judge to decrease the offense level used for
 25 sentencing if the defendant was a “minimal” or “minor” participant in the crime. This
 26 is a mitigating factor.

1 States v. Williamson, 183 F.3d 458 (5th Cir. 1999) (finding ineffective assistance where counsel failed
2 to cite controlling authority regarding sentence enhancement); and United States v. Harfst, 168 F.3d
3 398 (10th Cir. 1999) (stating that counsel's failure to argue defendant's entitlement to mitigation
4 under § 3B1.2 was deficient performance and prejudiced the outcome). The only Ninth Circuit
5 authority that Petitioner cites is United States v. Kwan, in which the court held that counsel's lack of
6 knowledge about immigration law and its negative effect on defendant's guilty plea constituted
7 ineffective assistance. 407 F.3d 1005 (9th Cir. 2005).

8 Magistrate Judge Benton correctly concluded that this argument is also without merit. The
9 cases addressing failure to argue for sentencing mitigation under Sentencing Guideline section 3B1.2
10 are not directly applicable here because section 3B1.2 provides for mitigation in the specific situation
11 where a defendant's participation in the crime was minimal or minor. Section 1B1.3, on the other
12 hand, is not a mitigation provision, but a general provision that describes the rules for determining the
13 sentencing range based on defendant's relevant conduct. A sentencing court is required by section
14 1B1.2(b) to factor relevant conduct, as described in section 1B1.3, into the sentencing determination.
15 Because section 1B1.2(b) instructs the sentencing judge to apply the factors in section 1B1.3, they
16 are automatically applicable, and therefore Mr. Tsuchida's failure to raise them with the sentencing
17 judge is harmless. Counsel's alleged failure to raise the issue did not constitute ineffective assistance.

18 Despite the distinction between the two sentencing guidelines, Petitioner asks the Court to
19 analogize the holdings of the cases that address section 3B1.2 to his case, and to hold that any failure
20 by counsel to raise sentencing issues is prejudicial to the defendant. He cites United States v.
21 Mannino, where the Third Circuit determined that counsel's performance was inadequate because
22 counsel failed to argue on appeal that the trial court had used incorrect methodology to calculate the
23 drug amount used for sentencing. 212 F.3d 835, 844 (3d Cir. 2000). However, in that case, counsel's
24 ineffectiveness hinged on the appellate court's determination that the sentencing court used incorrect
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1 methodology, an error that counsel has a duty to address. Id. Here, Petitioner's claims of judicial
2 error are unfounded. Therefore, the Mannino case is inapposite.

3 2. Petitioner Objects to the Conclusion That His Failure to Investigate Claim is Erroneous

4 Petitioner also argues that counsel's performance was deficient because counsel did not cite
5 any law supporting a lower sentence based on Ms. Muldrow's testimony. The cases Petitioner cites to
6 support his claim are not on point, because the evidence in those cases was found to be unreliable
7 when it was obtained from undiscoverable out-of-court sources. See United States v. Garcia-Sanchez,
8 189 F.3d 1143 (9th Cir. 1999) (reversing defendant's sentence where court relied on conclusions
9 drawn by a law enforcement agent from unrevealed out-of-court statements to make its estimate of
10 weekly drug sales); United States v. Culps, 300 F.3d 1069 (9th Cir. 2002) (holding that court may not
11 rely on conclusory statements from presentence report to calculate the drug amount); United States v.
12 Scheele, 231 F.3d 492, 499 (9th Cir. 2000) (requiring district courts to consider the margin of error
13 and to err on the side of caution when calculating drug amount). These cases are distinguishable from
14 the present case, where the witness testified and was cross-examined at trial. Counsel is not expected
15 to cite these cases, which are not on point and would not have been helpful to Petitioner's case.

16 Moreover, Petitioner's argument incorrectly assumes that neither sentencing court considered
17 Ms. Muldrow's testimony or gave it adequate weight, and that his counsel should have done more to
18 highlight the issue. As mentioned, both judges were fully informed of the relevant evidence. Because
19 Petitioner has not shown a failure of any duty that prejudiced the outcome of his sentencing, his claim
20 of failure to investigate fails.

21 3. Petitioner Objects to Magistrate Judge Benton's Failure to Accept All the Facts in His Failure to
22 Investigate Claim as True

23 In his final objection to Magistrate Judge Benton's R&R, Petitioner claims that all the
24 allegations in his petition regarding counsel's failure to investigate must be accepted as true, based on
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1 the government's failure to analyze the issue in its response. He cites 28 U.S.C. § 2248, which
2 provides that "[t]he allegations of a return to a writ of habeas corpus or an order to show cause in a
3 habeas corpus proceedings, if not traversed, shall be accepted as true except to the extent that the
4 judge finds from the evidence that they are not true."

5 On its face, this statute applies to allegations of fact in the return or response to the habeas
6 petition, not the petition itself. Petitioner's assertion that the Government failed to "traverse" the issue
7 is inaccurate. Although the Government did not include a separate section in its response analyzing
8 the failure to investigate issue, it did examine the operative facts for that issue in the context of
9 counsel's treatment of Ms. Muldrow's testimony. The relevant facts for both issues are the same, and
10 the Court is not obligated to accept Mr. Brown's allegations as true.

11 Conclusion

12 Petitioner's claims of ineffective counsel and failure to investigate are based entirely on the
13 narrow assertion that one witness' testimony should have been accorded greater weight, which
14 Petitioner assumes would have resulted in a lower calculation of the drug amount, and thus a lower
15 sentence. Under the Strickland standard, his attorney's actions adequately addressed this issue. There
16 was no error sufficient to meet the ineffectiveness prong of Strickland, nor is there reasonable
17 probability to assume that different actions would have resulted in a lower sentence. Therefore, the
18 Court ADOPTS Magistrate Judge Benton's R&R and DENIES Petitioner's § 2255 motion.

19 The clerk is directed to provide copies of this order to all counsel of record.

20 Dated: August 6, 2007

21 /s Marsha J. Pechman
22 Marsha J. Pechman
23 United States District Judge
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